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No. 93-1125

In The

Supreme Court of the United States

October Term, 1993

O. WILLIAM REEDER, JR.,

Petitioner,

versus

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, Individually and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

THE SUCCESSION OF MICHAEL B. PALMER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Dr. Reeder satisfy, as a basis for jurisdiction, any of the three factors set forth in Supreme Court Rule 10.1?

2. Is the unanimous decision by the Louisiana Supreme Court manifestly incorrect?

LIST OF PARTIES

O. WILLIAM REEDER, JR.

SUCCESSION OF MICHAEL B. PALMER

LYNN PAUL MARTIN

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

RESPONDENT'S BRIEF 1

I. DR. REEDER'S PETITION FAILS TO ASSERT A BASIS FOR SUPREME COURT JURISDICTION UNDER SUPREME COURT RULE 10 2

II. THE UNANIMOUS DECISION BY THE LOUISIANA SUPREME COURT REPRESENTS A THOUGHTFUL AND MANIFESTLY CORRECT APPLICATION OF LAW WHEN A PARTY, SUCH AS DR. REEDER, CHOOSES TO SPLIT CAUSES OF ACTION 3

A. BACKGROUND 3

1. RELEVANT PROCEDURAL FACTS 3

2. FACTUAL BACKGROUND 7

B. LEGAL CONCLUSIONS AND HOLDINGS THAT ARE INDISPUTABLY CORRECT AND THAT DR. REEDER DOES NOT DIRECTLY CHALLENGE 8

C. THE LOUISIANA SUPREME COURT'S UNANIMOUS REJECTION OF DR. REEDER'S OBLIQUE ATTACK WAS MANIFESTLY CORRECT 9

TABLE OF CONTENTS – Continued

Page

1. DR. REEDER OBLIQUELY ATTACKS THE APPLICABILITY OF THE FEDERAL DOCTRINE OF *RES JUDICATA* 9

2. THE LOUISIANA SUPREME COURT'S UNANIMOUS DECISION CORRECTLY DETERMINED THAT THE ISSUE BEFORE IT REQUIRED IT TO ANALYZE AND THEN APPLY PRECLUSION PRINCIPLES WHERE A PARTY DECIDES TO SPLIT HIS CAUSES OF ACTION 12

III. CONCLUSION 15

APPENDIX:

A – Excerpts from Dr. Reeder's Petition to the Louisiana Supreme Court A1

B – Excerpts from the Succession's Petition to the Louisiana Supreme Court A9

TABLE OF AUTHORITIES

Page

CASES

Bennett v. United States Trust Co. of New York, 770 F.2d 308 (2nd Cir. 1985), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed.2d 776 (1986) 15

Cannon v. Loyola University of Chicago, 784 F.2d 777 (7th Cir. 1986) 8

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 11

Clark v. Haas Group, Inc., 953 F.2d 1235 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 98 (1992) 8

Dowd v. Society of St. Columbans, 861 F.2d 761 (1st Cir. 1988) 8

Federated Department Stores v. Moitie, 452 U.S. 394, 101 S.Ct. 2424 (1981) 8

Fleming v. Travenol Laboratories, Inc., 707 F.2d 829 (5th Cir. 1983) 9

Fust v. Fontenelle, 558 So. 2d 715 (La.App. 4th Cir. 1990) 8

Gelb v. Royal Globe Insurance Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) 8

Guidry v. Bank of LaPlace, 954 F.2d 278 (5th Cir. 1992) 12

Guidry v. Bank of LaPlace, 740 F. Supp. 1208 (E.D. La. 1990), *affirmed in part and modified in part*, 954 F.2d 278 (5th Cir. 1992) 13, 14

Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983) 15

TABLE OF AUTHORITIES – Continued

Page

Mackey v. Pioneer National Bank, 867 F.2d 520 (9th Cir. 1989) 11

Matter of Howe, 913 F.2d 1138 (5th Cir. 1990) 8

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 8

O'Connell v. Economic Research Analysts, Inc., 499 F.2d 994 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) 14, 15

Reeder v. Succession of Palmer, 736 F. Supp. 128 (E.D. La. 1990), *affd per curiam*, 917 F.2d 560 (5th Cir. 1990) ..... *passim*

Rosado v. Wyman, 397 U.S. 397 (1970) 11

Stoll v. Gottlieb, 305 U.S. 165 (1938) 8

Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274 (5th Cir. 1984) 14

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 10, 11

STATUTES

Fed. R. Civ. Pro. 12(b)(6) 8, 12

La. R.S. 13:4231 5

MISCELLANEOUS

Restatement (Second) of Judgments at §§ 24-25 12

Wright, Miller & Cooper, Federal Practice and Procedure § 3567.1 at 133-36 and 136 n.20 (1984 and Supp. 1991) 14

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF THE UNITED STATES:

The Succession of Michael B. Palmer ("Succession") respectfully submits that Dr. O. William Reeder, Jr.'s ("Dr. Reeder") Petition for Writ of Certiorari should be denied for two reasons: First, the Petition does not allege, as a basis for jurisdiction, any of the three factors set forth in Supreme Court Rule 10.1. Second, the unanimous decision by the Supreme Court of the State of Louisiana is manifestly correct; not manifestly incorrect.

The Succession finally asks that the Court impose all costs and fees that it legitimately can upon Dr. Reeder.

I. DR. REEDER'S PETITION FAILS TO ASSERT A BASIS FOR SUPREME COURT JURISDICTION UNDER SUPREME COURT RULE 10

According to Supreme Court Rule 10, this Court only grants petitions for certiorari based upon "judicial discretion," and "only when there are special and important reasons therefor." Rule 10.1 then sets forth three situations where this Court will consider using its discretion in deciding whether to grant a Writ of Certiorari. Dr. Reeder's Petition does not invoke any of those three criteria.

Specifically, Dr. Reeder's Petition asserts, as a jurisdictional basis, that the unanimous decision of the Louisiana Supreme Court constitutes a manifestly erroneous interpretation of federal law. Dr. Reeder does not contend that the Louisiana Supreme Court decision is in conflict with another state supreme court decision or a United States appellate court decision. Dr. Reeder does not contend that the decision constitutes an important question of federal law which has not been but should be settled by this Court.[1] The Petition, therefore, should be denied without further analysis.

Rule 10.1, however, does not expressly set forth an exclusive listing of reasons that will be considered by this

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[1] The criteria set forth in Rule 10.1(a) is obviously inapplicable.

Court in deciding whether to grant a Petition for Certiorari. The Succession, accordingly, addresses below the contention that the decision by the Louisiana Supreme Court is manifestly erroneous.

II. THE UNANIMOUS DECISION BY THE LOUISIANA SUPREME COURT REPRESENTS A THOUGHTFUL AND MANIFESTLY CORRECT APPLICATION OF LAW WHEN A PARTY, SUCH AS DR. REEDER, CHOOSES TO SPLIT CAUSES OF ACTION.

A. *Background.*

1. Relevant procedural facts.

On July 10, 1989, Dr. Reeder filed a Complaint in federal court alleging violation of the Securities Act of 1933, the Securities Act of 1934, and Louisiana's Blue Sky law.[2] In October 1989, Judge Robert F. Collins granted the Succession's and the Bank of LaPlace's motion to dismiss. Judge Collins' written decision in *Reeder I* is dated May 2, 1990.[3]

On the same day that Dr. Reeder appealed, he filed an original Petition in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.[4] His counsel, however, chose not to serve it.

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[2] The federal court complaint and/or decision(s) are sometimes referred to herein as *Reeder I*.

[3] See *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. La. 1990), *affd per curiam*, 917 F.2d 560 (5th Cir. 1990).

[4] The state court petition and/or decision(s) are sometimes referred to herein as *Reeder II*.

After the Fifth Circuit Court of Appeals affirmed *per curiam* the dismissal of *Reeder I* and denied rehearing, Dr. Reeder amended the *Reeder II* petition. The factual allegations in *Reeder II*, however, remained virtually identical to the factual allegations contained in *Reeder I*.

Dr. Reeder then served the amended petition on the Succession and Bank of LaPlace only. Dr. Reeder's amended Petition asserted:

1. Violation of Louisiana's Blue Sky law;
2. Violation of the Unfair and Deceptive Trade Practices Act;
3. Negligence and breach of fiduciary duty "by failing to discover and prevent [Lynn Paul Martin's] fraudulent scheme from operating . . . "; and
4. Breach of contract.

The Succession and Bank of LaPlace then filed dispositive motions. The district court dismissed *Reeder II* concluding that the allegations contained in the amended petition failed to state a cause of action and/or were barred by the doctrine of *res judicata*.

Dr. Reeder appealed. Dr. Reeder, however, did not appeal the dismissal of the Bank of LaPlace.

On appeal, the Louisiana State Fifth Circuit Court of Appeals applied Louisiana's rule of *res judicata* in effect at the time,[5] rather than the federal rule of *res judicata*. The

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[5] See La. R.S. 13:4231 printed at A-11 of Dr. Reeder's Petition.

state Fifth Circuit concluded that the doctrine of *res judicata* barred only the Blue Sky law claim.

The state Fifth Circuit then held that the remaining claims, except the breach of contract claim, were either prescribed or perempted. The breach of contract claim failed to state a cause of action, according to the state appellate court, because it specifically identified the late Michael B. Palmer as an agent of Lynn Paul Martin.[6] Agents of disclosed principals, of course, cannot be held liable for the principal's breach of contract.[7] The state appellate court, with one dissenting judge, nevertheless, ruled that Dr. Reeder should be allowed to amend his petition to see if he could state a breach of contract claim.[8]

Dr. Reeder and the Succession then sought rehearing. The state Fifth Circuit denied both petitions for rehearing. Both parties sought review by the Louisiana Supreme Court.[9]

The Succession sought review because the Fifth Circuit Court of Appeals applied Louisiana, rather than the federal, law of *res judicata*.[10] Since the judgment was a

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[6] See Dr. Reeder's Petition at A-15.

[7] *Id.*

[8] See Dr. Reeder's Petition at A-14 thru A-18.

[9] Dr. Reeder claimed that certain claims were not prescribed in his Writ Application to the Louisiana Supreme Court. See Appendix A, which constitutes relevant portions of Dr. Reeder's Petition to the Louisiana Supreme Court.

[10] See Appendix B, which represents relevant portions of the Succession's Petition to the Louisiana Supreme Court.

federal judgment based upon federal question jurisdiction, the Succession contended that the federal rule of *res judicata* rather than Louisiana rule of *res judicata* should have been applied.[11] The Succession, alternatively, contended that its Petition should be granted since Dr. Reeder could not possibly amend his Petition so as to state a claim against Palmer for breach of contract, since his petition openly claimed (and correctly so) that Palmer was an agent of a disclosed principal.[12]

The Louisiana Supreme Court subsequently ruled that the doctrine of *res judicata*, as applied to a plaintiff who split claims, barred all of the *Reeder II* allegations.[13] After Dr. Reeder's application for rehearing was denied, he filed this Petition.

Dr. Reeder's Petition herein is virtually identical to Dr. Reeder's Application for Rehearing, which was unanimously denied by the Louisiana Supreme Court on October 7.

Dr. Reeder's Petition herein does not contest the dismissal of his Blue Sky Law claim, negligence or breach of fiduciary duty claims. Dr. Reeder's Petition, accordingly, in reality asks this Court only to allow him to amend his Petition in order to try to state a breach of contract claim under Louisiana law.

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[11] See Appendix B.

[12] See Appendix B.

[13] See Dr. Reeder's Petition at A-20 thru 36.

2. *Factual Background.*

The factual allegations in *Reeder I* and *Reeder II* are virtually identical.[14] In brief, Dr. Reeder alleged that Lynn Paul Martin, acting through other agents and representatives, such as Palmer, fraudulently induced persons to invest in his travel club.

Martin's scheme involved obtaining loans from individuals, such as the late Michael B. Palmer and Dr. Reeder, to purchase airline tickets in order to provide transportation to Las Vegas for various gamblers. Martin promised to repay all the monies, plus pay interest at the rate of 6% per month on the monies. Dr. Reeder then allegedly provided monies from October 13, 1986 through October 10, 1988. In all, he loaned $254,000 and received in return $68,400 for a total loss of about $185,600.

In April of 1988, Martin approached federal authorities and confessed to operation of a ponzi scheme. Michael B. Palmer committed suicide on May 8, 1988.[15] In the summer of 1988, Martin was sentenced and sent to federal prison.[16]

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[14] See Dr. Reeder's Petition at A-23.

[15] At the time of his death, Martin owed Palmer $671,856.

[16] Martin, who has never been served with either the *Reeder I* or *Reeder II* pleadings, was released from prison in 1993 and, on information and belief, currently lives in posh surroundings in Florida.

B. Legal Conclusions and Holdings That Are Indisputably Correct and That Dr. Reeder Does Not Directly Challenge.

The state Fifth Circuit Court of Appeals' decision[17] held that *res judicata* only barred the Louisiana Blue Sky law claim. At the time, Louisiana law could have been properly construed to reach that result.

The decision in *Reeder I* arose out of the *Reeder I* court's federal question jurisdiction.[18] The federal law of *res judicata*, therefore, applies.[19]

The federal law of *res judicata* bars all claims arising out of the same occurrence or transaction, regardless of whether those claims were asserted or not asserted.[20]

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[17] See Dr. Reeder's Petition at A-3 through A-18.

[18] For *res judicata* purposes, a dismissal under Fed. R. Civ. Pro. 12(b)(6) (failure to state a claim upon which relief may be granted) is a judgment on the merits. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981). *See also Fust v. Fontenelle*, 558 So. 2d 715, 717 (La.App. 4th Cir. 1990). The same is true for summary judgment (Fed. R. Civ. Pro. 56). *E.g., Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988).

[19] *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41-42 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987), and cases cited therein, including, but not limited to, *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938).

[20] *Matter of Howe*, 913 F.2d 1138, 1143-44 n.10 (5th Cir. 1990) (lender liability action barred by prior bankruptcy action); *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) ("*res judicata* . . . bars all claims that could have been advanced . . . "); *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 98 (1992) (dismissal of Fair Labor Standards Act suit for unpaid overtime barred subsequent Age Discrimination in Employment and Equal Pay Act claims); *Cannon v. Loyola*

The factual allegations in the *Reeder I* complaint and the *Reeder II* petition are virtually identical. The decision in *Reeder I*, accordingly, barred all the claims arising out of those allegations regardless of the fact that they were not asserted in *Reeder I*.[21]

Dr. Reeder does not directly challenge that application of the federal doctrine of *res judicata* would bar all of the *Reeder II* claims that were or that could have been asserted based on the factual allegations in the *Reeder I* complaint.

C. The Louisiana Supreme Court's Unanimous Rejection of Dr. Reeder's Oblique Attack Was Manifestly Correct.

1. Dr. Reeder obliquely attacks the applicability of the federal doctrine of *res judicata*.

Dr. Reeder obliquely attacks the applicability of the doctrine of *res judicata*. He argues that, even if the additional claims asserted in *Reeder II* had been asserted in *Reeder I*, the federal district court would have been required, absent extraordinary circumstances, to dismiss those allegations without ruling on the merits thereof. Dr. Reeder thus contends that while the federal law of *res*

University of Chicago, 784 F.2d 777 (7th Cir. 1986) (breach of contract claim barred by prior dismissal of Title IX claim); *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829 (5th Cir. 1983) (sex discrimination suit barred by prior dismissal of race discrimination claim).

[21] *Id.*

judicata would, if applied, bar the *Reeder II* claims based on the same factual allegations, the federal law of *res judicata* should not have been applied.

Dr. Reeder has not yet cited one case that directly supports his argument based on even remotely similar facts to those herein and for good reason. None exists.

Dr. Reeder's argument is based on a very unsound foundation. Specifically, Dr. Reeder contends that this Court's decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), does not vest discretion with the district judge for purposes of deciding to retain or not retain a pendent claim. Rather, according to Dr. Reeder, a district judge lacks discretion to exercise pendent jurisdiction over state law claims after dismissal of federal claims, in the absence of extraordinary circumstances.

Gibbs, however, vests district courts with discretion and does not require the existence of extraordinary circumstances in order to exercise said discretion in favor of retention of pendent claims. Specifically, this Court said:

> It has been consistently recognized that pendent jurisdiction is a doctrine of *discretion* . . . Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should *hesitate* to exercise jurisdiction over state claims . . . Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims *should* be dismissed as well. Similarly, if it appears that the state issues substantially predominate . . . the state claim *may* be dismissed without prejudice . . . (Emphasis added).

383 U.S. at 726.

Moreover, *Gibbs* has been subsequently construed by this Court in a fashion that is inconsistent with the position urged by Dr. Reeder herein. Specifically, in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), this Court spoke of the "distinction between the power of federal courts to hear state law claims and the *discretionary* exercise of that power." 484 U.S. at 349 (emphasis added). The *Carnegie-Mellon* Court then added that the discretion should be exercised by weighing "the values of judicial economy, convenience, fairness and comity . . . As articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of *flexibility*, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." 484 U.S. at 350 (emphasis added). See also, *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970) (Court *rejects* contention "that once a federal court loses power over the jurisdiction conferring claim, it may not consider a pendent claim . . . We are not willing to defeat the common sense policy of pendent jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation – by a conceptual approach that would require jurisdiction over the primary claim at all stages . . . ").

Lower courts, accordingly, have not looked for extraordinary circumstances, but, rather, exercised discretion based on the guidelines provided by this Court in determining whether to exercise pendent jurisdiction. See, *e.g.*, *Mackey v. Pioneer National Bank*, 867 F.2d 520, 523 (9th Cir. 1989) (retention of jurisdiction and resolution of state law claims after dismissal of federal claims held to the proper exercise of discretion, even though case had been in the federal system for only four (4) months, since

"retention of jurisdiction well served the purposes of judicial economy and efficiency"); and *Guidry v. Bank of LaPlace*, 954 F.2d 278, 285-86 (5th Cir. 1992) (court rejects argument that district court should have declined to exercise pendent jurisdiction after dismissing federal claims pursuant to Fed.R.Civ.Pro. 12(b)(6) in the early stages of the proceeding).

2. The Louisiana Supreme Court's unanimous decision correctly determined that the issue before it required it to analyze and then apply preclusion principles where a party decides to split his causes of action.

The Louisiana Supreme Court clearly understood Dr. Reeder's contention because it did not completely adopt the arguments raised by the Succession. That is, the Succession argued that the federal law of *res judicata* required the *Reeder II* courts to dismiss all claims that arose out of the same facts that were asserted in the *Reeder I* complaint, period.

The Louisiana Supreme Court, however, did not solely rest its holding on the general application of the federal law of *res judicata*. Rather, the Louisiana Supreme Court searched for authorities dealing with the application or nonapplication of *res judicata* where a party splits his claims. The Restatement (Second) of Judgments directly addresses said fact scenario at §§ 24 and 25.

The authority relied upon by the Louisiana Supreme Court (See Restatement (Second) of Judgments at §§ 24-25) calls for the application of the doctrine of *res judicata* unless the first court either lacked jurisdiction

over the omitted claims or having jurisdiction would clearly have declined to exercise it as a matter of discretion.[22]

The United States District Court for the Eastern District of Louisiana clearly had jurisdiction. The only issue, therefore, is whether it would have clearly declined to exercise it in its discretion if Dr. Reeder had presented all of his claims.

The Louisiana Supreme Court correctly determined that Judge Collins would not have clearly declined to exercise jurisdiction as a matter of discretion for two indisputable reasons. First, he chose to exercise pendent jurisdiction over Dr. Reeder's Blue Sky law claim. See *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. La. 1990), *aff'd per curiam*, 917 F.2d 560 (5th Cir. 1990). Second, in another case involving the same ponzi scheme where, rather than splitting causes of action, the plaintiff asserted both federal and all of his pendent claims in federal court, Judge Collins, and on review the federal Fifth Circuit Court of Appeal, exercised jurisdiction over all of the pendent claims. See *Guidry v. Bank of LaPlace*, 740 F.Supp. 1208 (E.D. La. 1990), *affirmed in part and modified in part*, 954 F.2d 278 (5th Cir. 1992).

There the Federal Fifth Circuit, contrary to the position espoused by Dr. Reeder herein, affirmed dismissal with prejudice of all federal claims and several state law claims, including some negligence claims, based on the

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[22] See Dr. Reeder's Petition at A-26 thru A-36.

absence of a duty to protect third parties from the criminal conduct of another. The *Guidry* panel, however, modified the decision below so as to dismiss without prejudice several claims, including fraud and negligent misrepresentation, because the *Guidry* panel concluded that Mr. Guidry might be able to amend to state a claim.

The *Guidry* panel certainly did not refuse to exercise jurisdiction over the pendent claims, as it dismissed some with prejudice and would have dismissed all the pendent claims with prejudice, except for its conclusion that plaintiff might be able to amend to state a cause of action. Thus, the *Guidry* decision dispositively rejects Dr. Reeder's argument that, assuming his negligence, breach of fiduciary duty and breach of contract claims had been asserted, they would have been dismissed without prejudice.

The *Guidry* decision is not an anomaly. Federal district and appeals courts have not consistently dismissed all pendent state claims when the federal claims were dismissed prior to trial. A leading treatise cites eighteen federal cases in which state claims were retained and decided even though the federal claim was dismissed before trial, and additional federal cases recognizing that dismissal of state claims is not automatic merely because the federal claims are dismissed before trial. 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3567.1 at 133-36 and 136 n.20 (1984 and Supp. 1991). See also, *e.g. Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 285 (5th Cir. 1984) (exercise of pendent jurisdiction over state law claims proper even after the federal district court had eliminated the federal antitrust claims by summary judgment); *O'Connell v. Economic Research Analysts, Inc.*, 499 F.2d 994, 996 (5th Cir. 1974) (dismissal of

claim under the Securities Exchange Act of 1934, because defendants were not "controlling persons" under the Act, not followed by remand to state court but rather remand to federal district court for exercise of discretion as to whether to hear state law fraud claim), *cert. denied*, 419 U.S. 1122 (1975); *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1317-20 (5th Cir. 1983) (bar to federal cause of action based on releases did not preclude court from then reaching the merits of plaintiff's state law claims); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308 (2nd Cir. 1985) (affirming dismissal of claims under Securities Exchange Act of 1934 and state common law fraud, *inter alia*, for failure to state a cause of action), *cert. denied*, 474 U.S. 1058, 106 S.Ct. 800, 88 L.Ed. 2d 776 (1986).

III. CONCLUSION

Dr. Reeder's Petition should be denied.

The Succession is not money-laden, and the assets of the Succession should go to Mr. Palmer's heirs and not attorneys. In order to replenish some of the Succession's assets, so that said monies can go to the heirs, the Succession prays for an Order imposing all fees and costs that this Court can legitimately impose on Dr. Reeder and his counsel.

Respectfully submitted,

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APPENDIX A

SUPREME COURT FOR LOUISIANA

NUMBER: _____

O. WILLIAM REEDER, JR.

Plaintiff/Appellee

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY AND D/B/A LPM ENTERPRISES AND BANK OF LAPLACE

Defendants/Appellant

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW TO THE COURT OF APPEAL, FIFTH CIRCUIT, STATE OF LOUISIANA

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INDEX

1.) Introduction ii

2.) Statement of Case 1

2.) Assignment of Errors 2

4.) Argument 3-4

5.) Conclusion 4

6.) Attachments

a) Verification of Counsel 5

b) Original Petition 6-12

c) First Supplemental and Amending Petition ..13-15

d) Exceptions of Res Judicata, Peremption [sic], No Cause of Action and Prescription ..16-30

e) Memorandum in Opposition to the Succession of Michael B. Palmer's Exceptions. 31-52

f) Judgment of Trial Court 53

g) Appellant's Brief to Appellate Court 54-83

h) Appellee's Brief to Appellate Court 84-129

i) Appellant's Supplemental Brief to Appellate Court 130-132

j) Appellee's Supplemental Brief to Appellate Court 133-149

k) Appellate Court Opinion..... 150-162

l) Appellant's Application for Partial Rehearing 163-183

m) Appellee's Application for Partial Rehearing 184-200

n) Notice of Denial of Rehearing 201

INTRODUCTION

This case raises a single issue for review:

1. Whether timely filing of a Proof of Claim, pursuant to La. C.C.P. Arts 3241, et. seq., in a pending succession proceeding, suspends the running of prescription on that claim.

This issue was raised in the trial court by way of an exception of prescription filed on behalf of the Succession of Michael B. Palmer. The matter was briefed by both parties. The trial court failed to rule on the exception. The appellate court, noting that the exception was not the basis of the dismissal because of the trial court's failure to rule, considered the exception to still be before the Court. Notwithstanding the fact that a formal proof of claim had been served on both the succession representative and the attorney for the succession in July of 1988, the appellate court held the delictual claims to be prescribed.

STATEMENT OF THE CASE

On May 10, 1990, O. William Reeder (Reeder) filed his original petition in the 24th Judicial District Court. Exhibit B. Thereafter, Reeder filed his First Supplemental and Amending Petition on January 28, 1991. Exhibit C. In response thereto, the Succession of Michael B. Palmer (Palmer) filed exceptions of Res Judicata, Peremption [sic], No Cause of Action and Prescription. Exhibit D. The exceptions were tried on April 24, 1991. Thereafter, on April 26, 1991, the trial court entered judgment maintaining Palmer's exceptions of No Cause of Action and Res Judicata. Reeder's claims were dismissed with prejudice. Exhibit F. The trial court did not address the exception of

prescription which had been raised by Palmer and briefed by both parties. Exhibits D and E.

Reeder timely appealed the dismissal of his claims to the Court of Appeal, Fifth Circuit, State of Louisiana. The matter was duly briefed by the parties. Exhibits G and H. The Court of Appeal then requested additional briefs on the issue of whether the trial court should have given Reeder an opportunity to amend his pleadings. In response to this request the parties filed supplemental briefs. Exhibits I and J. On September 16, 1992 a five judge panel of the Fifth Circuit rendered judgment affirming in part, annulling in part and remanding the matter to the trial court for further proceedings. Exhibit K. The parties timely applied for partial rehearings. Exhibits L and M. Reeder's request was refused on October 19, 1992. Exhibit N.

The matter now comes before this Court on an Application for a Writ of Certiorari or Review, to review the decision of the appellate court.

ASSIGNMENT OF ERROR

1. The appellate court erred in maintaining Palmer's exception of prescription as to Reeder's delictual claims even though Reeder had timely filed a written Proof of Claim in the Succession of Michael B. Palmer, No. 363-621, 24th Judicial District Court for the Parish of Jefferson, and served said Proof of Claim by certified mail, under cover dated July 29, 1988, upon both the attorney of record for the succession and the succession representative, all in accordance with La. C.C.P. Arts.

3241, et. seq., thereby suspending the running of prescription on Reeder's delictual claims. This manifestly erroneous interpretation of La. C.C.P. Arts. 3241, et. seq. will cause Reeder material injustice if permitted to stand.

ARGUMENT

1. Reeder's *Proof of Claim*, made pursuant to La. C.C.P. Arts. 3245, et seq., suspended the running of prescription on his delictual claims against the Succession of Michael B. Palmer.

It is difficult to imagine a more clear and simple statement of the law than that found in La. C.C.P. Art. 3245 which provides, in part, as follows:

> A) A creditor may suspend the running of prescription against his claim by delivering personally or by certified or registered mail to the succession representative, or his attorney of record, a formal written proof of claim. . . .
>
> B) Such proof of claim shall be sworn to by the claimant and shall set forth:
>
> (1) The name and address of the creditor;
>
> (2) The amount of the claim, and a short statement of facts on which it is based; and
>
> (3) If the claim is secured, a description of the security and of any property affected thereby. . . .
>
> C) The submission of this formal proof of claim, even though it be rejected subsequently by the succession representative, shall suspend the running of prescription

> against the claim as long as the succession is under administration. . . .

In the instant case, Reeder filed a Proof of Claim in accordance with La.C.C.P. Article 3245 and directed that Proof of Claim to the attorney for the succession as noted in the succession pleadings, namely, Paul C. Pepitone. A copy of the claim is found in the original record at pages 127-139 and was made part of Reeder's opposition to the Exception of Prescription filed in the trial court. The claim was rejected by both the executrix and the attorney for the succession. Copies of these letters of rejection are found in the original record at pages 123 and 124 and are also part of Reeder's opposition to the Exception of Prescription. Exhibit E. Rejection of the claims was a prerequisite to judicial enforcement. La.C.C.P. Article 3246. The "Succession of Michael B. Palmer", No. 363-621, 24th Judicial District Court for the Parish of Jefferson remains under administration at the present time. This Court can take judicial notice of that fact. All of these facts were completely ignored by the Appellate Court. Additionally, it is the "succession" and not "heirs" of Michael B. Palmer that is a party in these proceedings. This clearly indicates that the succession remains under administration. Thus, pursuant to La.C.C.P. Article 3245, prescription against Reeder's claims remains suspended. See, *Smith v. Anderson*, 563 So.2d 380 (1st Cir. 1990) (Writ Denied Oct. 5, 1990).

CONCLUSION

The judgment of the Appellate Court holding Reeder's claims to be barred by prescription of one year is clearly wrong and should be reversed.

Respectfully submitted;

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A Professional Law Corporation

/s/ Bruce A. North
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served upon all counsel of record, by placing same in the United States Mail, postage prepaid, this 13th day of November, 1992.

/s/ Bruce A. North

PLAINTIFF'S EXHIBIT A

VERIFICATION

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary, personally appeared:

BRUCE A. NORTH

who was sworn and who declared that he is the counsel for O. William Reeder, Jr., plaintiff/appellant and petitioner in the foregoing application for writs; that he has prepared the foregoing application; that the factual allegations therein set forth are true and correct to the best of his knowledge, information and belief; and that a copy thereof has been served by mail on counsel for all parties herein and upon the Fifth Circuit Court of Appeal.

/s/ Bruce A. North
BRUCE A. NORTH

SWORN TO AND SUBSCRIBED before
me, Notary, this 13th day of
November, 1992.

/s/ David L. Colvin
NOTARY PUBLIC

APPENDIX B

92-C-3002

SUPREME COURT

STATE OF LOUISIANA

NO. 92-C-3002

O. WILLIAM REEDER, JR.,
Plaintiff/Appellant

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,
Defendants/Appellees

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW FROM THE FIFTH CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

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INDEX

Table of Cases iii

Statement of Writ Grant Considerations iv

Memorandum 1

I. Background 1

A. Statement of the Case 1

B. Factual Background 4

II. Assignment of Errors 5

III. Summary of Argument 5

IV. Argument 7

A. Principles Applicable to the Federal Law of *Res Judicata* 7

B. This Court Should Grant a Writ of Certiorari Or Review in Order to Address a Significant Unresolved Issue of Law 14

C. This Court Should Grant a Writ of Certiorari or Review Because the Decision of the Fifth Circuit Conflicts with Decisions of the Louisiana Supreme Court and Erroneously Interprets or "Applies" "the Intramural Federal Law" of *Res Judicata* and in So Doing Has Caused Material Injustice and Adversely Affected a Significant Public Interest 15

D. This Court Should Grant the Writ of Certiorari Or Review in Order to Correct the Conflict Between the Decision of the Fifth Circuit and This Court's Decision in *Preis v. Standard Coffee Co.* 17

Conclusion 18

Verification 23

Appendix - Exhibits

A. Dr. Reeder's Federal Court Complaint 24

B. The Federal Court decisions in *Reeder v. Succession of Michael B. Palmer,* 736 F.Supp. 128 (E.D. La. 1990), *aff'd. per curiam* and *rehearing denied per curiam,* 917 F.2d 560 (5th Cir. 1990) 37

C. Dr. Reeder's original State Court Petition 43

D. Dr. Reeder's State Court Amended Petition 50

E. State trial court Judgment 53

F. Order dated May 26, 1992 54

G. Supplemental Brief on behalf of W. William Reeder 55

H. Fifth Circuit Court of Appeal Order and Opinion 58

I. Fifth Circuit's Order denying of Petition for Rehearing 71

CASES

Anderson v. Phoenix Investment Counsel of Boston, Inc., 387 Mass. 444, 440 N.E.2d 1164 (1982) 14

Dowd v. Society of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988) 8

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 14

Federated Dept. Stores v. Moitie, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981) 8, 16

Fust v. Fontenelle, 558 So.2d 715, 717 (La.App. 4th Cir. 1990) 8

Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 41-42 (2d Cir. 1986), *cert denied*, 480 U.S. 948 (1987) 14

Jeanes v. Henderson, 688 S.W.2d 100 (Tex. 1985) 14

Matter of Howe, 913 F.2d 1138 (5th Cir. 1990) ... 7, 8, 15

McNeal v. Paine, Webber, Jackson & Curtis, Inc., 249 Ga. 662, 293 S.E.2d 331 (1982) 13

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir. 1983) 7, 8

Pilie & Pilie v. Metz, 547 So.2d 1305 (La. 1989) ..... iv, v, 6, 8, 14, 15, 16, 17

Preis v. Standard Coffee Service Co., 545 So.2d 1010 (La. 1989) ..... v, 5, 6, 17, 18

Reeder v. Succession of Michael B. Palmer, 736 F.Supp. 128 (E.D. La. 1990), *aff'd. per curiam* and *rehearing denied per curiam*, 917 F.2d 560 (5th Cir. 1990) ..... i, iv

Rennie v. Freeway Transport, 294 Or. 319, 656 P.2d 919 (1982) 14

Stoll v. Gottlieb, 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938) 14, 15

STATUTES

Fed. R. Civ. Pro. 12(b)(6) ..... iv, 8

Fed. R. Civ. Pro. 56 ..... iv, 8, 17

STATEMENT OF WRIT GRANT CONSIDERATIONS

Pursuant to Rule X, Section 1, the Succession of Michael B. Palmer ("Succession") submits that this Court should grant a writ of certiorari or review because:

1. The decision of the Fifth Circuit raises a significant issue of law which has not been, but which should be, resolved by this Court; and

2. The decision of the Fifth Circuit is in conflict with decisions of this Court;

3. The Fifth Circuit either erroneously interpreted or applied the doctrine of *res judicata*; and

4. The decision represents a departure from proper judicial proceedings.

While each of these factors will be addressed more fully in the argument, the Succession will briefly address them at this point. Specifically, at issue herein is whether the decision rendered in *Reeder v. Succession of Palmer*, 736 F.Supp. 128 (E.D. 1990), *aff'd. per curium*, 917 F.2d 560 (5th Cir. 1990); *rehearing denied per curium*, 917 F.2d 560 (5th Cir. 1992),[1] bars the litigation filed in the 24th Judicial District Court for the Parish of Jefferson,[2] where *Reeder I* followed the filing of dispositive motions pursuant to Rule 12(b)(6) and 56 of the Federal Rules of Civil Procedure, and the factual allegations in *Reeder I* and *Reeder II* are virtually identical.

---

[1] Hereinafter referred to as *"Reeder I."*

[2] Hereinafter referred to as *"Reeder II."*

SIGNIFICANT UNRESOLVED ISSUES OF LAW. Unlike *Pilie & Pilie v. Metz*, 547 So.2d 1305 (La. 1989), the *Reeder I* Court had federal question jurisdiction. This distinction seems important, because this Court in *Pilie* suggested that the determination of which law was to be applied (federal) did not address what was the federal *res judicata* law to be applied in a diversity case. 547 So.2d at 1309-10. This Court in *Pilie*, however, did not answer that question because there was no distinction between "the intramural federal law and the law of New York (the state in which the diversity court sat) . . . " 547 So.2d at 1309-10. Since the present case involves a determination issued by the *Reeder I* Court pursuant to federal question jurisdiction, this Court should address what is the federal law of *res judicata* to be applied, i.e., Louisiana law or "the intramural federal law."

CONFLICTING DECISIONS. The decision of the Fifth Circuit conflicts with this Court's decisions in *Pilie, supra*, where this Court stated that "the intramural federal law" of *res judicata* barred subsequent claims (legal theories) where same arose "out of the same transaction as the claim or cause of action presented in the earlier proceedings;" and *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989), wherein this Court held that *res judicata* barred previously unasserted legal theories of recovery where same arose from the same juridical or material facts.

ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS CAUSING MATERIAL INJUSTICE AND SIGNIFICANTLY AFFECTING PUBLIC INTEREST. The decision of the Fifth Circuit barred, pursuant to the doctrine of *res judicata*, only one

of Dr. Reeder's claims. Specifically, it barred Dr. Reeder's claims pursuant to Louisiana's Blue Sky Law. In so doing, the Fifth Circuit purported to, but clearly did not, apply "the intramural federal law" of *res judicata*, and erroneously interpreted or applied the rule of this Court as enunciated in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989). In so doing, the Fifth Circuit caused material injustice, as it potentially forces one of Lynn Paul Martin's victims (the Succession) to continue to expend monies defending barred claims, and significantly and adversely affects the public interest, as represented by the doctrine of *res judicata*.

DEPARTURE FROM PROPER JUDICIAL PROCEEDINGS. See Conclusion.

* * *

The Petition in *Reeder II* was filed on **May 10, 1990**. Made Defendants were the Succession, Bank of LaPlace and Lynn Paul Martin. Martin, however, was never served and has never answered. He currently resides in a federal prison near Pensacola, Florida.

By this action, Dr. Reeder seeks to recover $185,600 from the Succession alone, as Dr. Reeder did not appeal dismissal of the Bank of LaPlace. Stated differently, Dr. Reeder solely seeks reimbursement from another of Martin's victims (Palmer – his Succession).

II. ASSIGNMENT OF ERRORS

A. The Fifth Circuit Generally Erred By Failing To Methodically Address Whether The Federal Or State Law Of *Res Judicata* Applied

And If It Determined That Federal Law Applied, Determining What The Applicable Federal Law Was.

B. The Fifth Circuit Specifically Erred By Not Determining That The Federal, Rather Than The State, Law Of *Res Judicata* Applied, Since The Federal Court Was Hearing The Action Pursuant To Its Federal Question, Rather Than Diversity, Jurisdiction.

C. The Fifth Circuit Glaringly Failed To Apply "The Intramural Federal Law" Of *Res Judicata* Which Bars Relitigation Of All Claims That Could Have Been Raised Arising Out Of The Same Operative Facts As In The Previous Litigation.

D. Even If Louisiana Law Of *Res Judicata* Applies, The Fifth Circuit Erred When It Did Not Follow The Principles Enunciated By This Court In *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989).

E. The Fifth Circuit Erred By Allowing Reeder To Attempt To Amend His Petition Again.

III. SUMMARY OF ARGUMENT

"The intramural federal law" of *res judicata* bars all claims or legal theories of recovery which Dr. Reeder raised or which Dr. Reeder could have raised, wherein said claims or legal theories of recovery arise out of the same nucleus of operative facts as set forth in the *Reeder I* complaint. Since the factual allegations in *Reeder I* and *Reeder II* are virtually identical, "the intramural federal law" of *res judicata* bars all such claims herein even

though Dr. Reeder did not assert some of those claims or legal theories of recovery in the *Reeder I* complaint.

Federal judgments should be accorded *res judicata* effect by state courts. While there may be some basis for discord as to what is the federal law of *res judicata* to be applied where the federal court sits pursuant to its diversity jurisdiction,[12] there should be no discord where the federal court is sitting pursuant to its federal question jurisdiction. Then the state court must unquestionably apply "the intramural federal law" of *res judicata.*

The Fifth Circuit's decision conflicts with this Court's decision in *Pilie, supra,* and/or erroneously interprets or applies "the intramural federal law" of *res judicata* because the decision failed to bar all claims asserted below that arise out of the same nucleus of operative facts as *Reeder I.*

Even if Louisiana law of *res judicata* applies, but it does not, the Fifth Circuit, nevertheless, erred and put itself in conflict with the principles enunciated in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989), when it did not bar all claims arising out of the same juridical or material facts.

Dr. Reeder alleged that Palmer was the agent of a disclosed principal. The Fifth Circuit concluded that Dr. Reeder made that allegation and held that, as a matter of law, Palmer could not be liable for breach of contract since he was the agent of a disclosed principal. Both the finding and the conclusion are sound. Dr. Reeder, who

---

[12] The choice is between state law or "intramural federal law," as this Court coined that phrase in *Pilie.* 547 So.2d at 1309.

did not even oppose the *res judicata* exception in the trial court, should not be given leave to amend, since Dr. Reeder has already alleged that the loss he incurred resulted from a contract with Lynn Paul Martin, wherein the late Michael B. Palmer was the alleged agent of the disclosed principal (Martin). Stated differently, *res judicata* would bar any amended petition because Dr. Reeder would still be complaining about a loss arising from the same nucleus of operative facts as in *Reeder I*.

IV. ARGUMENT

A. Principles Applicable to "the IntraMural Federal Law" of *Res Judicata*.

"The intramural federal law" of *res judicata* requires that:

(1) The parties be identical in both suits;

(2) A court of competent jurisdiction rendered the prior judgment;

(3) There was a final judgment on the merits in the previous litigation; and

(4) The plaintiff raises the same cause of action or claim in both suits.

Matter of Howe, 913 F.2d 1138, 1144 (5th Cir. 1990).

"[I]t is black-letter law that *res judicata* . . . bars all claims that *could have been* advanced in support of the cause of action on the occasion of its former adjudication. . . . " *Nilsen v. City of Moss Point*, 701 F.2d 556, 560 (5th Cir. 1983) (emphasis in original). See also, *Matter of Howe*, 913 F.2d 1138, 1143-44 (5th Cir. 1990), which, in

pertinent part, also states that *res judicata* bars "all questions that could have been raised."

Whether two suits involve the same claim is determined, not by

> . . . the relief requested or the legal theory asserted but whether plaintiff bases the two actions on the same nucleus of operative facts.

Howe, supra at 1144. "A party may not avoid the preclusive effect of *res judicata* by asserting a new theory or a different remedy." *Matter of Howe*, 913 F.2d 1138, 1144 n.10 (5th Cir. 1990).

This Court reached a similar conclusion stating that "the intramural federal law" of *res judicata* bars:

> "remedies whether the party's right to those remedies was actually litigated in the earlier proceeding or not, if the later-asserted right is found to arise out of the same transaction as the claim or cause of action presented in the earlier proceeding."

Pilie & Pilie v. Metz, 547 So.2d 1305, 1310 (La. 1989). See also, *Nilsen*, 701 F.2d at 560.

The elements of federal *res judicata* are met here. In particular, the parties are identical in both the federal suit and the instant action; the federal court had competent jurisdiction; there was a final judgment on the merits in the previous decision;[13]

---

[13] For *res judicata* purposes, a dismissal under Fed. R. Civ. Pro. 12(b)(6) (failure to state a claim upon which relief may be granted) is a judgment on the merits. *Federated Dept. Stores v.*

and Dr. Reeder bases the two actions on the same nucleus of operative facts.[14]

That *Reeder I* and *Reeder II* involve the same nucleus of operative facts can be gleaned from a comparison of the Complaint and the Petition:

* * *

state court); *Rennie v. Freeway Transport*, 294 Or. 319, 656 P.2d 919 (1982) (federal judgment under Securities Exchange Act of 1934 barred fraud legal theories in state court); *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985) (federal judgment under Securities Exchange Act of 1934 and state law legal theories barred declaratory judgment action in state court); and *Anderson v. Phoenix Investment Counsel of Boston, Inc.*, 387 Mass. 444, 440 N.E.2d 1164 (1982) (federal judgment under Investment Advisers Act of 1940 barred unfair and deceptive trade practices legal theories in state court).

B. This Court Should Grant a writ of Certiorari Or Review in Order to Address a Significant Unresolved Issue of Law.

In *Pilie & Pilie v. Metz, supra*, this Court reversed a decision by the First Circuit Court of Appeals for failing

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Moitie, 452 U.S. 394, 398-99, 101 S.Ct. 2424, 2428 (1981). *See also Fust v. Fontenelle*, 558 So. 2d 715, 717 (La.App. 4th Cir. 1990). The same is true for summary judgment (Fed. R. Civ. Pro. 56). *E.g., Dowd v. Society of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988).

[14] Another way of stating the final requirement is that the claims arise out of the same transaction or series of transactions. *Philie*, 547 So.2d at 1311.

to apply the federal law of *res judicata*. This Court in *Pilie*, however, distinguished the application of federal law and what was the federal law to be applied. In *Pilie, supra*, there was a previous judgment from a federal court, which heard the case pursuant to its diversity jurisdiction. Accordingly, with implicit reference to the *Erie* doctrine,[16] the choices were "the intramural federal law" of *res judicata* or the law of the state in which the federal court was sitting. This Court did not resolve that question or issue in *Pilie*, because federal law and New York law were identical.

The *Reeder I* court had federal question jurisdiction. "A state court must apply federal law to determine the preclusive effect of a prior federal question judgment." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41-42 (2d Cir. 1986), *cert denied*, 480 U.S. 948 (1987), and cases cited therein, including, but not limited to, *Stoll v. Gottlieb*, 305 U.S. 165, 170-71, 59 S.Ct. 134, 136-37, 83 L.Ed. 104 (1938).

This Court, accordingly, should grant the writ of certiorari or review in order to:

1. Declare that Louisiana courts must apply "the intramural federal law" of *res judicata* to prior federal question judgments; and then

2. Apply properly "the intramural federal law" of *res judicata* to the facts herein.

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[16] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

C. This Court Should Grant a Writ of Certiorari or Review Because the Decision of the Fifth Circuit Conflicts with Decisions of the Louisiana Supreme Court and Erroneously Interprets or "Applies" "the Intramural Federal Law" of *Res Judicata* and in So Doing Has Caused Material Injustice and Adversely Affected a Significant Public Interest.

In *Pilie & Pilie v. Metz*, 547 So.2d 1305 (La. 1989), this Court held that the federal law of *res judicata*, as opposed to the state law of *res judicata*, had to be accorded a federal judgment. Similarly, the United States Supreme Court in *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), held that a state court was bound to apply the federal doctrine of *res judicata* where there is a previous federal court judgment.

Whether two suits involved the same cause of action or claim is determined not by:

> . . . the relief requested or the legal theory asserted, but whether plaintiff bases the two actions on the same nucleus of operative facts.

Howe, supra at 1144. This Court held that "the intramural federal law" of *res judicata* bars:

> . . . remedies whether the party's right to those remedies was actually litigated in the early proceeding or not, if the later-asserted right is found to arise out of the same transaction as the claim or cause of action presented in the earlier proceeding.

Pilie & Pilie v. Metz, 547 So.2d 1305, 1310 (La. 1989).

In the present case, the Fifth Circuit Court of Appeals purported to apply federal law. See p. 6 of the Opinion (Exhibit H). At p. 6, the Fifth Circuit Court of Appeals even correctly quoted the requirements for *res judicata* under federal law. The Fifth Circuit's decision, however, conflicts with *Pilie, supra*, and the federal decisions cited therein, and erroneously applied or interpreted *Pilie* because it obviously did not apply the fourth element (plaintiff raises the same cause of action or claim in both suits).

The Fifth Circuit clearly put itself in conflict with *Pilie* and erred in holding that *res judicata* barred only Dr. Reeder's Blue Sky Law claim because "the intramural federal law" of *res judicata* bars all claims or legal theories of recovery arising out of the same nucleus of operative facts. A comparison of Exhibits A, C and D at pp. 9-13, *supra*, plainly shows that Dr. Reeder's negligence, breach of fiduciary duty and breach of contract claims arise out of the same nucleus of operative facts.

Besides being clearly erroneous, the Fifth Circuit's decision significantly and adversely affects the public interest, because it failed to apply *res judicata* which in and of itself embodies important public policy. According to the U.S. Supreme Court:

> The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." (Citations omitted). The Court of Appeals'

> reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." (Citations omitted). We have stressed that "[the] doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . "

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 402, 101 S.Ct. 2424, 2427 and 69 L.Ed.2d 103 (1981).

Finally, besides being clearly erroneous and significantly and adversely affecting the public interest, the decision will cause material injustice. The Succession will be forced to continue to defend and expend monies when it is quite obvious that any allegations in an amended petition will still be barred by the doctrine of *res judicata* because Dr. Reeder's losses are associated with Lynn Paul Martin's Travel Club.

This Court, accordingly, should grant a writ of certiorari or review in order to erase the conflict with *Pilie* and the federal cases cited therein, and correct the erroneous interpretations and application of "the intramural federal law" of *res judicata*.

D. This Court Should Grant the Writ of Certiorari Or Review in Order to Correct the Conflict Between the Decision of the Fifth Circuit and This Court's Decision in *Preis v. Standard Coffee Co.*

As one can see from the decision of the Fifth Circuit, it held that Louisiana law of *res judicata* in effect at the time of the filing of the lawsuit barred only Dr. Reeder's Blue Sky Law claim. Stated differently, the court held that *res judicata* would bar only a claim under Louisiana's Blue Sky Law because *Reeder I* alleged violation of Louisiana's Blue Sky Law and dismissed the same Blue Sky Law claim.

The Succession is aware that a court could reach the result reached below by applying Louisiana's law of *res judicata* prior to this Court's decision in *Preis v. Standard Coffee Service Co.*, 545 So.2d 1010 (La. 1989). The Succession, however, submits that the result reached below cannot be accorded with the principles announced in *Preis, supra.*

There, this Court considered whether Preis' unfair trade practices claim under La. R.S. 51:1401, *et seq.*, was barred by *res judicata*, based on his prior counterclaim alleging unlawful interference with his right to do business. Stated differently, **Preis did not assert an unfair and deceptive trade practices claim in his prior counterclaim.**

This Court, nevertheless, held that both actions were based on the same alleged misconduct or juridical or material facts, i.e., namely attempts to enforce an illegal nonsolicitation agreement. Therefore, even though the

unfair trade practices claim required different proof from the original counterclaim, and was not even asserted in the original counterclaim, the unfair and deceptive trade practices claim was barred by the doctrine of *res judicata*, since it arose out of the same juridical or material facts. 545 So.2d at 1013.

It is quite clear that the Complaint in *Reeder I* did not seek recovery pursuant to the legal theories of negligence, breach of fiduciary duty and breach of contract. Nevertheless, a review of the Complaint in *Reeder I* and the Petition, as amended, in *Reeder II* (compare Exhibits A, C and D, and/or see pp. 9-13, *supra*) reveals that both actions were based on the same juridical or material facts. Application of Louisiana's law of *res judicata*, accordingly, would bar also those allegations. *Preis, supra* at 1013.

CONCLUSION

As set forth above, it is quite clear that:

1. The Court in *Reeder I* had federal question jurisidiction;

2. The Court in *Reeder I* issued a judgment on the merits;

3. "The intramural federal law" of *res judicata* bars subsequent litigation of any claims or legal theories arising under the same nucleus of operative facts as set forth in previous litigation;

4. The legal theories asserted in *Reeder II*, such as negligence, breach of fiduciary duty and breach of contract, are barred because they arise out of the same nucleus of operative

facts as the allegations in *Reeder I*, and in fact, are virtually identical to the allegations in *Reeder I*;

5. The rule espoused by this Court in *Preis v. Standard Coffee Service Co., supra*, requires barring claims or legal theories raised in subsequent litigation where said claims or legal theories arise out of the same juridical or material facts as contained in prior litigation.

This Court, accordingly, should grant a writ of certiorari or review for reasons set forth above and hold that all of the claims in Dr. Reeder's Petition, as amended, are barred by the doctrine of *res judicata*.

The writ of certiorari or review, however, should go one step further. As one can see from the decision of the Fifth Circuit, the five-judge panel unanimously concluded that Palmer was the agent of a disclosed principal and, accordingly, not liable for breach of contract. Yet, by a 4-to-1 vote, the Court allowed Dr. Reeder the chance to amend his Petition in order to state, if he could, a breach of contract claim. Why?

It is frequently impossible to know what prompts or inspires a court to rule. While that is certainly true in this case, one can surmise that the language on p. 10 of the Opinion may have something to do with the decision. Specifically, at p. 10, the Court states:

> In reality, it defies logic and reason to say that, under the circumstances pointed out above, that Palmer did not know exactly the fraud that Martin was indulging in to the detriment of plaintiff as he allegedly personally

> helped Martin carry out the scheme and allegedly made many false representations to plaintiff himself. If these allegations are true, it shocks conscience and a sense of fairness if a man in Palmer's position cannot be held accountable for his actions. Plaintiff is entitled to a second chance to try to hold him accountable in contract through an amendment of his petition.

The above is not true! There is absolutely no basis in the record for such a statement. The public record, in fact, contains evidence that, by use of logic and reason, does not allow for such a conclusion.

Dr. Reeder's Petition, as amended, contains the following conclusory language:

> Palmer knew or should have known that the travel club scheme perpetrated by Martin was fraudulent in nature; further, Palmer owed a duty to plaintiff to discover and prevent the scheme from continuing to operate to plaintiff's and others' detriment. Palmer breached this special and fiduciary duty by failing to discover and prevent the fraudulent scheme from operating, thereby causing damage to plaintiff as aforesaid.

See Paragraph 26.

A fair reading of Paragraph 26 sets forth, with the exception of a naked and conclusory allegation of knowledge, allegations based on an absence of knowledge but a duty to acquire knowledge, and a failure to have acquired knowledge of Martin's fraudulent scheme. There is, accordingly, no basis for the language on p. 10 of the Opinion stating that it "defies logic and reasoning to

say . . . that Palmer did not know exactly the fraud that Martin was indulging in to the detriment of plaintiff . . . "

The public record, moreover, contains two entries that do not allow such a conclusion. Specifically,

1. As can be seen from the Answers filed by the Succession in other pending actions, Martin owed Palmer $671,856;

2. At Lynn Paul Martin's sentencing hearing, he was repeatedly asked whether anyone else was involved with him. The court was attempting to induce a yes answer, which would have resulted in a lesser sentence to Martin and pursuit of those in cahoots with him. Martin identified no one else.[17]

The Succession submits that it defies logic and reason to believe that Mike Palmer would knowingly assist and help Lynn Paul Martin defraud, among others, his neighbor, Dr. Reeder, through a ponzi scheme and, nevertheless, allow Mr. Martin to be indebted to him in the sum of $671,856. The Succession further submits that it defies logic and reason to believe that Lynn Paul Martin would identify no one as knowing of his scheme and knowingly assisting in his scheme where there was tremendous inducement for him to do the opposite. The Government has not pursued the Succession.

When the Fifth Circuit asked for briefs addressing solely the issue of whether Dr. Reeder should be allowed

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[17] The statements set forth in No. 2 above were obtained from Martin's counsel, Lee Leonard and Eileen Shaver, Assistant U.S. Attorney, not from an independent review of the public records by the undersigned.

to amend his Petition to assert a claim for breach of contract, Dr. Reeder responded stating that "certainly, in the instant case, there is the conceivable possibility that the plaintiff can state a cause of action against the defendant." See Exhibit G. Dr. Reeder has already filed a Complaint, a Petition and Amended Petition. The three read virtually identical.

Given the fact that Palmer was an agent for a disclosed principal, and that the doctrine of *res judicata* bars any and all legal theories of recovery associated with Dr. Reeder's losses with Lynn Paul Martin's Travel Club, the Succession submits that Dr. Reeder cannot file an Amended Petition which would not be barred by the doctrine of *res judicata* or the doctrine that an agent for a disclosed principal was not liable for the principal's breach of contract.

This Court, accordingly, should also grant a writ based on a departure from proper judicial proceedings, and order that Dr. Reeder's Petition be finally dismissed with prejudice at this point and end this litigation.

/s/ Ellis B. Murov
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Attorneys for Succession of
Michael Brady Palmer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon:

Bruce A. North
1100 Fourth Street
Gretna, Louisiana 70053

Clerk of Court
Fifth Circuit Court of Appeals
State of Louisiana
Gretna, Louisiana 70053

Honorable Ronald P. Loumiet
24th Judicial District Court
Parish of Jefferson
Gretna, Louisiana 70053

by hand or by U.S. Mail, postage prepaid and properly addressed, this 18 day of November, 1992.

/s/ Ellis B. Murov
ELLIS B. MUROV

SUPREME COURT

STATE OF LOUISIANA

NO.

O. WILLIAM REEDER, JR.,
Plaintiff/Appellant

VERSUS

THE SUCCESSION OF MICHAEL B. PALMER, LYNN PAUL MARTIN, INDIVIDUALLY and d/b/a LPM ENTERPRISES and BANK OF LaPLACE,
Defendants/Appellees

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ELLIS B. MUROV,

who, after being duly sworn, did depose and state:

Affiant has prepared and read the aforegoing Application for Writ of Certiorari or Review. The factual allegations are accurate and the legal citations, principles and representations are both accurate and sound. Affiant has mailed or delivered the application to the Fifth Circuit Court of Appeals and counsel for Dr. Reeder, Bruce A. North, 1100 Fourth Street, Gretna, LA 70053.

/s/ Ellis B. Murov
ELLIS B. MUROV

Sworn to and Subscribed Before Me
this 18th day of November, 1992.

/s/ Pat S. Hughes
NOTARY PUBLIC